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Appellant's Brief 1975-SC-1177

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APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 75-1177


COMMONWEALTH OF KENTUCKY, ex rel
DEPARTMENT FOR NATURAL
RESOURCES AND ENVIRONMENTAL
PROTECTION AND ROBERT F. STEPHENS,
ATTORNEY GENERAL, on behalf of the
COMMONWEALTH OF KENTUCKY APPELLANTS

VS. APPEAL FROM ORDER OF CONTEMPT
ENTERED ON NOVEMBER 3, 1975, ADJUDGING
PLAINTIFFS/APPELLANTS IN CONTEMPT OF
FINAL ORDER AND JUDGMENT
ENTERED ON THE 27TH DAY OF SEPTEMBER, 1975

MORRIS STEPHENS
TOMBSTONE JUNCTION ENTERPRISES
KENTUCKY HIGHWAY 90
PARKERS LAKE, KENTUCKY APPELLEES

BRIEF FOR APPELLANTS COMMONWEALTH OF KENTUCKY DEPARTMENT FOR NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION

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(Certificate of Service on inside of Front Cover)

FILED

FEB 9 - 1976

MARTHA LAYNE COLLINS
CLERK

SUPREME COURT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the herein BRIEF FOR APPELLANTS was served by mailing true copies hereof, postage prepaid on the 9th day of February, 1976, to the Honorable J. B. Johnson, Sr., Williamsburg, KY 40769 and the Honorable Homer Ramsey, Whitley City, KY 42653, Attorneys for the Appellees, and the Honorable Squire N. Williams, Jr., Circuit Judge, Franklin County Court House, Frankfort, Kentucky 40601.


R. LEE ARMBRUSTER
Special Assistant Attorney General

TABLE OF CONTENTS AND AUTHORITIES

	Page
STATEMENT OF THE QUESTIONS PRESENTED	1-2
STATEMENT OF THE CASE	2-4

ARGUMENT 1

THE TRIAL COURT ERRED IN HOLDING THE COMMONWEALTH IN CONTEMPT, AS THE LANGUAGE IN THIS JUDGMENT WAS UNCLEAR AND THE COMMONWEALTH HAD UNDERTAKEN PROPER PROCEDURAL STEPS TO EFFECTIVELY STAY THE JUDG- MENT	4-9
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----

THE JUDGMENT WAS EFFECTIVELY STAYED BY THE ACTIONS OF THE COMMONWEALTH CR 62.03 — Pending Ap- peal of Judgment Other Than Injunctive Judgment	4
--------------------------------------------------------------------------------------------------------------------------------------------------------------	---

CR 62.03 (1)

“ . . . The appellant can stay enforcement of the Judgment by giving a supersedeas bond . . . ”	4
----------------------------------------------------------------------------------------------------------	---

CR 62.03 (2)

“If the appellant is a governmental unit ex- empted from . . . the provisions of Rule 81A, the filing of a notice of appeal . . . shall stay en- forcement of the judgment . . . where the giving of a supersedeas bond would effect such a stay.”	4
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

TABLE OF CONTENTS **AND AUTHORITIES (Continued)**

	Page
CR 81 A	
Exemption of Governmental Units From Giving Bond. "Whenever a bond is or may be required . . . to stay . . . enforcement of a judgment, such requirement shall not apply to . . . the Commonwealth or any of its political subdivisions. . ."	5
THE JUDGMENT IS NOT AN INJUNCTIVE JUDGMENT NOR DOES THE JUDGMENT PROPERLY REFLECT THE PRESENT STATUS OF THE PARTIES.	
CR 62.02 — Pending Appeal of Injunctive Judgments	5
CR 65.03(5) — Restraining Order ". . . a restraining order shall remain in force until and not after . . . (2) the entry of an order on a motion for a temporary injunction"	6
CR 65.04 (4) — Temporary Injunction "(A Temporary Injunction) . . . shall remain in force until modified or dissolved on motion"...	7

**TABLE OF CONTENTS
AND AUTHORITIES (Continued)**

Page

ARGUMENT II

THE TRIAL COURT ERRED IN NOT RE- QUIRING THE APPELLEES TO APPLY AS PER KRS 146.200 TO KRS 146.350 TO THE DE- PARTMENT PRIOR TO FINDING THE DE- PARTMENT IN CONTEMPT FOR FAILURE TO COMPENSATE FOR UNDETERMINED PROHIBITED USES	9-13
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------

CR 65.08

Interlocutory Relief Pending

Appeal From Final Judgment	10
----------------------------------	----

KRS 146.290

“Land Uses Permitted In Stream Area”	11
--------------------------------------------	----

CONCLUSION	13-14
------------------	-------

SUPREME COURT OF KENTUCKY

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**MORRIS STEPHENS
TOMBSTONE JUNCTION ENTERPRISES
KENTUCKY HIGHWAY 90
PARKERS LAKE, KENTUCKY ----- APPELLEES**

**BRIEF FOR APPELLANTS
COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION**

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTIONS PRESENTED

I

**DID THE TRIAL COURT ERR IN HOLDING THE
COMMONWEALTH IN CONTEMPT, AS THE LAN-
GUAGE IN THIS JUDGMENT WAS UNCLEAR AND**

THE COMMONWEALTH HAD UNDERTAKEN PROPER PROCEDURAL STEPS TO EFFECTIVELY STAY THE JUDGMENT?

II

DID THE TRIAL COURT ERR IN NOT REQUIRING THE APPELLEES TO APPLY AS PER KRS 146.200 TO KRS 146.350 TO THE DEPARTMENT PRIOR TO FINDING DEPARTMENT IN CONTEMPT FOR FAILURE TO COMPENSATE FOR UNDETERMINED PROHIBITED USES?

STATEMENT OF THE CASE

On the 27th day of August, 1975, a Final Order and Judgment was duly entered in this case, listed as Civil Action No. 85519 in Franklin Circuit Court. (TR 2-3) The Appellants subsequently filed on the 23rd day of September with the Clerk of the Franklin Circuit Court a Notice of Appeal to the Kentucky Court of Appeals of this Judgment and subsequently on the 1st day of October, 1975, filed a Designation of Record on Appeal. (TR 4, 5) This appeal from the Final Order and Judgment is presently before this Court and is listed as File No. 75-1050.

On the 1st day of October, 1975, the Appellee, Morris Stephens, by counsel, filed with the Franklin Circuit Court Clerk a MOTION TO DISSOLVE RESTRAINING ORDER AND MOTION TO FIND PLAINTIFF IN CONTEMPT AND TO TRANSFER THIS CASE TO McCREARY CIRCUIT COURT. (TR 6-7) On the 27th day of October, 1975, Judge Squire N. Williams, Jr., Franklin Circuit Court, issued an Order direct-

ing the Appellants to this action to appear before Franklin Circuit Court on the 3rd day of November, 1975, to show cause why they should not be adjudged in Contempt of Court for failure to comply with the final Order and Judgment entered in this case on the 27th day of August, 1975. (TR 14) After a hearing at which all parties were present, Judge Squire N. Williams, Jr. found the Appellants herein in Contempt of Court as per the Order filed the 3rd day of November, 1975, for failing to comply with the Final Judgment of August 27, 1975. (TR 17)

The Appellants sought a Writ of Prohibition to gain appropriate relief from the ruling holding the Commonwealth in Contempt of Court, and said Petition was filed with the Clerk of this Court on the 6th day of November, 1975. The aforesaid Petition for Writ of Prohibition is currently pending before this Court and is listed as File No. 75-1003½. Subsequent to the filing of the Petition, the Appellants filed on the 25th day of November, 1975, a Notice of Appeal from the Order of Contempt. (TR 18)

The Appellant has moved this Court to consolidate the actions listed as File Nos. 75-1050 and 75-1003½; all parties have agreed to such consolidation. The aforesaid motion is presently pending before this Court.

This appeal from the Order of Contempt entered against the Appellants raises the question of whether the good faith actions of the Commonwealth in following the procedural mandate of the Rules of Civil Procedure and the statutory requirements of KRS Chapter 146 effec-

tively stayed the Final Order and Judgment entered in Franklin Circuit Court on the 27th day of August, 1975.

ARGUMENT I

THE TRIAL COURT ERRED IN HOLDING THE COMMONWEALTH IN CONTEMPT, AS THE LANGUAGE IN THIS JUDGMENT WAS UNCLEAR AND THE COMMONWEALTH HAD UNDERTAKEN PROPER PROCEDURAL STEPS TO EFFECTIVELY STAY THE JUDGMENT.

The Appellants believe that the timely filing of their Notice of Appeal to the Kentucky Court of Appeals on the 23rd day of September, 1975, effectively stayed the execution of the Judgment filed in this action on the 27th day of August, 1975. In support of this assertion, the Appellants respectfully call the Court's attention to Civil Rule 62.03, Pending Appeal of Judgment Other Than Injunctive Judgment, which provides in pertinent part of Section (1) as follows:

"when an appeal is taken the appellant can stay enforcement of the Judgment by giving a supersedeas bond as provided in Rule 73.04."

Section (2) of CR 62.03 provides that:

"If the appellant is a governmental unit exempted from the execution of a bond under the provisions of Rule 81A, the filing of a notice of appeal by such party shall stay enforcement of the judgment as to it in all cases where the giving of a supersedeas bond would effect such a stay."

It is further the Appellants' contention that it fulfills

the requirements of CR 81A, EXEMPTION OF GOVERNMENTAL UNITS FROM GIVING BOND, which states in part:

"Whenever a bond is or may be required by these Rules in order . . . to stay proceedings under or the enforcement of a judgment, *such requirement shall not apply to . . . the Commonwealth or any of its political subdivisions or any of their agencies or officers acting for or on their behalf.*" (Emphasis Added)

Therefore, the timely filing of the Notice of Appeal effectively stayed the Final Judgment herein under CR 62.03, CR 63.04 and CR 81A.

The only possible issue as to whether the Judgment in this case has been effectively stayed is whether said Judgment filed August 27, 1975, is to be deemed an Injunctive Judgment. If it were so considered, the provisions of CR 62.02, Pending Appeal of Injunction Judgments, would govern. It is the Appellants' contention that the aforesaid Judgment is not an Injunctive Judgment within the intent of CR 62.02, which explicitly provides that an Injunctive Judgment is ". . . any final judgment granting or denying injunctive relief. . . ."

The only true reference to the granting or denying of injunctive relief per se may be found in paragraph three (3) of the Judgment herein in question. In this paragraph, the Circuit Court makes the statement that:

"The Defendants' Motion to Dismiss and the motion

to dissolve the Temporary Restraining Order are overruled."

This statement implies that the Appellee, Morris Stephens, was and is currently under a restraining order issued by the trial court. An examination of the Court file as lodged at that time with the Clerk of the Franklin Circuit Court and currently before this Court reveals a contrary proposition. On the 6th day of December, 1974, the Appellants filed a MOTION FOR TEMPORARY INJUNCTION and said temporary injunction issued after hearing on the 10th day of December, 1974. A copy of the Temporary Injunction issued on the aforementioned date is located in the record. (TR 1)

There is no question but that the issuance of the temporary injunction on December 10, 1974, by the Franklin Circuit Court had the effect of terminating the previously granted restraining order. Rule 65.03(5), Restraining Order, addresses itself to this question by providing that unless an earlier termination date is specified "... a restraining order shall remain in force until, and not after ... (2) the entry of an order on a motion for a temporary injunction." Such a temporary injunction was issued by the trial court on December 10, 1974.

Thus the Court's reference to the existence of a temporary restraining order in paragraph (3) of its Judgment on which a motion to dissolve would act, is technically impossible. As pointed out previously, what existed on the day the judgment was rendered was a temporary injunction, not a restraining order which had been null and void since the 10th day of December, 1974.

With respect to said temporary injunction, no motion to dissolve it was ever filed as required by Rule 65.04(4), which provides:

"A temporary injunction becomes effective and binding on the party enjoined when the order is entered. It shall remain in force until modified or dissolved *on motion* or until a permanent injunction is granted or denied." (Emphasis Added)

Neither action specified above has been taken to terminate the presently outstanding temporary injunction, and thus the trial court's overruling of the Defendant's motion to dissolve the temporary restraining order should be read as being of no effect. Even if the language in paragraph three (3) were interpreted as addressing itself to the injunctive relief then in existence, i.e., the temporary injunction, there was never pending before the court any motion on which the ruling to dissolve the temporary injunction could have been granted. The language of Rule 65.04(4) is clear, and thus the temporary injunction granted December 10, 1975, continues in force inasmuch as the Defendant-Appellee never entered the necessary motion for dissolution.

In summary of this particular point, it is the Appellants' position that the injunction which is currently in effect was not affected by the judgment entered herein and appealed from, inasmuch as said injunction existed before the judgment and was not addressed in any proper manner by the judgment, but stood alone and apart in and of itself. Accordingly, since the judgment in question has no relation to this or any other injunction, it is respectfully submitted that the judgment entered here-

in is not an injunctive order and was accordingly stayed by the manner of the perfection of this appeal, thus rendering the contempt order invalid and erroneous.

For purposes of determining whether any other paragraph of this Judgment entitles it to be interpreted as an Injunctive Judgment, it is imperative to examine the remaining paragraphs in a logical manner.

Paragraph one (1) of the Judgment is in essence a declaration of law advising the Attorney General that he "may" (emphasis added) use injunctive process to enforce the Wild Rivers Act embodied in KRS Chapter 146. No injunction is either issued or denied by this language.

The second (2d) paragraph of the Judgment is a directive to the Commonwealth that it "shall, simultaneously with the request for injunctive relief, initiate proceedings either by condemnation or otherwise to compensate the landowner." Implicit within this language is the requirement of future action. There has been no request for injunctive relief by the Commonwealth since the entry of this Judgment on August 27, 1975.

Paragraph four (4) of the Judgment entered in this action states:

"The Defendants may apply to this Court for such relief as justice may require if the Commonwealth does not forthwith take the action required by this judgment."

The Appellants respectfully contend that this paragraph is not applicable to the present situation, as Appel-

lants contend that the Final Judgment was stayed as of the 23rd day of September, 1975, when the Notice of Appeal was filed. The judgment being properly stayed would remove this action from the jurisdiction of Franklin Circuit Court as far as the subsequent enforcement of this particular paragraph and indeed the entire Judgment is concerned.

The Appellants are prosecuting an appeal in this matter in good faith and with all due diligence, and it is erroneous for the Franklin Circuit Court to find the Appellants in contempt for "violating" a Judgment which has been effectively stayed as a matter of law. No action has been taken by the Commonwealth since the entry of the aforesaid Judgment except to begin proper steps for Appeal therefrom. The Appeal is based, as it must be, solely on the content of the Judgment as entered, and not on any ancillary matter. The Appellants contend that the judgment must be construed literally as to the exact language employed therein.

ARGUMENT II

THE TRIAL COURT ERRED IN NOT REQUIRING THE APPELLEES TO APPLY, AS PER KRS 146.200 TO KRS 146.350, TO THE DEPARTMENT PRIOR TO FINDING SAID DEPARTMENT IN CONTEMPT FOR FAILURE TO COMPENSATE FOR UNDETERMINED PROHIBITED USES.

The Appellants believe that the Order of the Franklin Circuit Court clearly deals with the performance of some act at a future date and time. The Order clearly states that at the time any injunctive relief is requested,

the Commonwealth shall simultaneously initiate proceedings either by condemnation or otherwise to compensate the landowner.

Since the entry of the Final Order and Judgment in the cause herein, the Commonwealth has not requested any injunctive relief or enforcement thereof in strict compliance with the Final Order and Judgment.

The Commonwealth appeared to show cause why it should not be held in contempt after receiving an order for the rule and upon receiving no actual notice from the Appellees, Morris Stephens and Tombstone Junction Enterprises, of their aforementioned motion. At the hearing, the Commonwealth attempted to explain its position to the Court, that an appeal was being timely prosecuted and that by the terms of the Final Judgment and Order the Judgment had been effectively stayed.

No consideration was apparently given to this good faith position. If in fact the Appellants had misunderstood the Judge's Order, it would seem only equitable that an opportunity be given to the Commonwealth in such situation to purge itself of the Order of Contempt.

Further, the Commonwealth remains of the opinion that it at all times acted properly, and that the Appellees were under an obligation to proceed with proper application to either the Franklin Circuit Court or to the Court of Appeals under the Rules of Civil Procedure to obtain a stay under CR 65.08 of the Temporary Injunction entered on the 10th day of December, 1975, which was improperly not made a part of the Judgment entered on the 27th day of August, 1975.

The Commonwealth further states that the Final Judgment overlooks major constitutional questions presented to the Court; however, the Commonwealth believes the Opinion and subsequent Judgment of the Respondent Judge were correct in declaring KRS Chapter 146 (Wild Rivers Act) constitutional and in not limiting any of the existing provisions of that Act. The Commonwealth believes that KRS 146.290 implicitly provides that application must be made to the Department for Natural Resources and Environmental Protection for approval of variances with any of its provisions and to determine possible uses by the applicant-landowner.

Illustrative of this point is that KRS 146.290 "Land Uses Permitted In Stream Area" provides in pertinent part:

"Utility lines or pipe lines shall not be constructed unless *approved by the Secretary* in writing and under provision that the affected land be restored as nearly as possible to its former state," and further that ". . . select cutting of timber shall be allowed only pursuant to regulations issued by the Secretary." (Emphasis Added)

Although the Commonwealth agrees that the statute provides for compensation to the extent that a clear taking of property rights is shown, the Commonwealth feels strongly that there must first be a determination that the regulation goes beyond the limits of constitutional regulation to the extent of becoming a taking. If this is found, then a determination must be made as to what rights or uses are being taken. This is impossible to

calculate absent any specifications by the Appellees of what intended uses are being prohibited.

In short, the Commonwealth should not be required to speculate as to every conceivable use which may be restricted in every circumstance and then proceed to compensate the landowner for all these unknown uses.

Therefore, the Judgment and Contempt Order itself are clearly erroneous. The statute clearly means that an owner may not use the land in a prohibited manner without first applying for a variance from the requirements of KRS Chapter 146. Such application or petition has never been received by the Department from the Appellees, Morris Stephens and Tombstone Junction Enterprises.

The Department is still unaware of what activities are contemplated and without an application specifying these items, the Department has no way of determining which activities could be permitted and which could not. Since compensation can be requested, if at all, only for those intended uses prohibited, the Department could not possibly initiate proceedings for compensation until the Defendant-Appellee submits his application as contemplated by the statute, as there is no definitive basis for such an assessment as would be required by compensation proceedings and an order compelling compensation proceedings under such adversity is unduly harsh and one incapable of being properly and adequately fulfilled.

CONCLUSION

In conclusion, the Commonwealth would reaffirm its belief that the judgment appealed from herein was effectively stayed as previously discussed. Should this position be in error and should the Court find that said judgment was not in fact properly stayed under the Rules of Civil Procedure, the Commonwealth would respectfully urge that a contempt order is, under these facts, unduly harsh and inequitable. The Commonwealth was not attempting in any manner to avoid or circumvent compliance with the lower court's Order.

On the contrary, the Commonwealth recognized the validity of the Order and accordingly sought to appeal therefrom, believing at all times that the action of the Commonwealth had effectively stayed the enforceability of that Order. The Commonwealth stands ready now, as it has throughout, to comply fully with the Court's Order. However, it was only the good faith belief of the Commonwealth that the Order was properly stayed that prompted the Commonwealth to refrain from immediately initiating condemnation proceedings as per the Court's Order. To penalize this party through a contempt citation for what is clearly, at worst, excusable error would contradict the clear intent of our judicial system to provide justice tempered by fairness. It should also be noted that the Appellee has suffered no real harm as a result of the Commonwealth's actions, since the Commonwealth, but for its interpretation, would have moved for a stay of Judgment which would have similarly saved the Commonwealth from immediately initiating the

condemnation process during the pendency of the appeal on the merits of this case.

Thus to the extent that the Commonwealth is found in error, if at all, no real harm has been suffered and the good faith of the Commonwealth would clearly mitigate against any exemplary measures. Accordingly, the Commonwealth respectfully urges that the contempt order is improper, inequitable and beyond the necessities of justice and fairness to the parties concerned.

Respectfully submitted,

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